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419645—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 597

COLLIN & GISSEL (LUDWIG BAER), PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the trial court (R. 87) is reported in R. D. 4580, 2 Cust. Ct. 957. The opinion of the appellate division of the United States Customs Court (R. 100) is reported in R. D. 4723, 4 Cust. Ct. 622. The opinion of the United States Court of Customs and Patent Appeals (R. 107–116) is reported in C. A. D. 176, 77 Treas. Dec. Advance Sheets No. 3 (July 17, 1941), p. 22.

JURISDICTION

The judgment of the United States Court of Customs and Patent Appeals was entered on June

9, 1941 (R. 117). The petition for a writ of certiorari was filed on September 9, 1941. The jurisdiction of this Court is invoked under section 195 of the Judicial Code as amended (U. S. C. Title 28, sec. 308).

QUESTION PRESENTED

Petitioner exported a beer barrel washing machine from Germany on July 11, 1934, and imported it at Houston, Texas, on August 10, 1934. Although petitioner had sold and imported a number of these machines both before and after July 11, 1934, no such machines then in the United States were for sale on that date. The question is whether at the time of exportation such machines were freely offered for sale, so that their United States value could be fixed under section 402 (e) of the Tariff Act of 1930.

STATUTES INVOLVED

The pertinent parts of the statutes involved are set forth in the Appendix, *infra,* pp. 7–12.

STATEMENT

Petitioner, the exclusive agent for beer barrel washing machines in the United States, imported such a machine at the port of Houston, Texas, on August 10, 1934 (R. 6, 8). The machine had been exported from Germany on July 11, 1934 (R. 9, 11). Petitioner's practice was to contract to sell these machines, and thereafter to have the machines so ordered exported from Germany to fulfill

the contract (R. 10). Petitioner had sold, exported and delivered such machines in the United States some time prior to July 11, 1934, and up to March 16, 1934; petitioner also sold and had exported some machines within a two- or three-week period surrounding July 11, 1934; and some it sold considerably after that date (R. 69–74; 110–112). No machines then in the United States were for sale on July 11, 1934 (R. 10, 74, 112), and, so far as the record shows, no machines in the United States were at any time offered for sale after their importation (R. 10).

The machine in controversy was appraised at the port of entry at Reichmarks 12,511.30 ($5,045.80) net, packed, on the basis of its cost of production as defined in section 402 (f) of the Tariff Act of 1930 (*infra,* pp. 8–9), (R. 8, 15, 193). Petitioner appealed for reappraisement claiming that the machine had a United States value, as defined in section 402 (e) of the Act, *infra,* and, consequently, that the cost of production could not be resorted to under section 402 (a), *infra.*

The trial court held that no foreign or export value existed for the machine; that statutory United States value did exist; that United States value was the proper basis for appraisal, and that the proper value thereof was $3,529.92 (R. 87–95). On review by the appellate division of the Customs Court, the judgment of the trial court was affirmed (R. 100–106). On appeal to the Court of Customs and Patent Appeals, the judgment of the appellate

division of the Customs Court was reversed on the ground that evidence of offers to sell merchandise which had not been imported on or prior to the date of exportation of the merchandise being appraised, was incompetent to show United States value as defined in section 402 (e), *infra* (R. 107–116). The judgment below, in effect, reinstates the value as found by the appraiser on the basis of the cost of production.

ARGUMENT

The machine in controversy was subject to an *ad valorem* rate of duty; the issue concerns its correct valuation for the purpose of assessing duty on it. Section 402 (a) of the Tariff Act of 1930, *infra,* provides that for duty purposes the value of imported merchandise shall be foreign or export value, whichever is higher. But if neither of these values can be satisfactorily ascertained, then the value shall be the United States value as defined in section 402 (e), *infra.* If none of these values can be ascertained, then the value shall be the cost of production. Since it is now conceded that neither export nor foreign value existed (R. 108),[1] the controversy is limited to whether the appraisal should have been based on United States value.

Section 402 (e) of the Tariff Act of 1930 provides that the United States value shall be the

[1] The Government originally contended that the merchandise had a foreign value, but this contention was abandoned in the court below (R. 108).

price at which such or similar *imported* merchandise is freely offered for sale in the United States, with prescribed allowances. The court below, following its prior decisions in the cases of *United States* v. *G. W. Sheldon & Co.,* 23 C. C. P. A. (Customs) 245, and *The Stern Hat Co.* v. *United States,* 26 C. C. P. A. (Customs) 410, held that on July 11, 1934, no machines then imported into the United States were for sale and that only offers for sale of prototype merchandise which had been actually imported previous to the export date involved could be considered as a basis for United States value. In these circumstances, United States value could not be ascertained and the valuation basis was necessarily the cost of production.

It has long been held by this Court that the term "imported merchandise" when used in tariff statutes means merchandise which arrives in the United States from foreign countries, unless the Congress by clear expression shows a contrary intention. *Marriott* v. *Brune,* 9 How. 619; *Lawder* v. *Stone,* 187 U. S. 281. The provision of law defining United States value first appeared as section 402 (d) of the Tariff Act of 1922, 42 Stat. 858, 949, and was reenacted in the Tariff Act of 1930, 46 Stat. 590. There is nothing in the legislative history of either act to show that the term was used by Congress in a sense contrary to that expressed above.[2] In the light of the decisions of this

[2] See S. Rept. 595, 67th Cong., 1st sess.; H. Rept. 7 and S. Rept. 37, 71st Cong., 1st sess.

Court, the construction of the court below that under section 402 (e) merchandise must be actually imported before offers to sell may be used as a basis to ascertain United States value is reasonable. Although the Government had in earlier cases urged in the court below a contrary construction, the instant decision does not appear to be of sufficient present importance to warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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